IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 448 OF 1992

Union of India. .... Appellant.
(Orgl.Opponent.)

Versus.

1. Oswald Anthony Athayde
2. Mr.George Abrahim.
3. The New India Assurance Co.Ltd. .... Respondents.

(No.1-Org.Applicant
No.2 & 3 - Org.
Opponents.)

Shri S.N.Gawade, A.G.P. for the Appellant.

Ms.S.V.Sonawane for the Respondent No.1.

CORAM ; ABHAY S. OKA, J.

DATED : 1st September, 2004.

ORAL JUDGMENT.

1. The Appellant-Union of India has taken exception to the Judgment and Award passed by the Motor Accident Claims Tribunal on 12th January 1990 in a Claim Petition filed by the Respondent No.1 under the provisions of the Motor Vehicles Act, 1939.

2. The case of the Respondent No.1 in the Claim Petition is that he suffered injuries in a motor accident which took place on 27th July 1987. The case of the Respondent No.1 was that he was travelling in an ambassador car which was proceeding from Mahim to Sahar

Airport. The accident took place early in the morning when the traffic signals were not operating. When his car came near the junction of Mahim Causeway and Western Express Highway and when he was taking right turn towards Western Express Highway, a bus owned by the Department of Atomic Energy of the Appellant-Union of India came from Bandra side and front side of the bus dashed against the leftside of the car in which the Respondetn No.1 was travelling. Respondent No.1 suffered various injuries for which initially he was treated in the KEM Hospital, Bombay, and thereafter he was hospitalised in the Bombay Hospital. The claim for compensation made by Respondent No.1 is for Rs.2 lakhs.

A Written Statement was filed by the Appellant. The contention raised in the Written Statement is that the bus was being driven in normal speed and the Driver of the bus by using Light signal gave indication to the driver of the car to reduce the speed. Ignoring the signals, the Driver of Car took a very sharp turn towards right side. Though the driver of the bus applied brakes, as the car was in high speed, collision could not be averted and that left side of the car collided against the bus resulting in the accident and damage to the car and the bus. The accident took place due to the negligence on the part of the driver of the car and there is no fault on the part of the driver of

the bus. The Respondent No.3 is the insurance company with which the car was validly insured on the date of accident and the Respondent No.2 is the owner of the car in which the Respondent No.1 was travelling.

3. By the impugned Judgment and Award the Tribunal awarded compensation of Rs.1,70,270/- with interest thereon at the rate of 12% per annum from the date of application till realisation.

4. The learned Counsel appearing for the Appellant submitted that from the evidence on record it is very clear that the accident took place only due to the negligence on the part of the driver of the ambassador car. The learned Counsel pointed out that it was the ambassador car which took right turn at the junction from the main road for the purpose of joining the Western Express Highway and therefore, the Driver of the car should have been cautious before taking right turn at the main junction. He pointed out that the driver of the bus took all precautions and immediately applied brakes when he found that the car was taking the right turn.

5. The learned Counsel for the Appellant has taken me through the oral evidence and the documents produced on

record. The learned Counsel further submitted that as a result of the injuries sustained in the accident, the Respondent No.1 did not loose his employment and there was no pecuniary loss to the Respondent No.1. The learned Counsel therefore submitted that the compensation under the head of the prospective loss could not have been awarded. The submission is that the compensation awarded is exorbitant.

6. The learned Counsel appearing for Respondent No.1 supported the impugned judgment and award. The learned Counsel pointed out that though Respondent No.1 may not have been removed from his existing employment, the accident not only affected his future prospects of promotion but considering disability suffered by the Respondent No.1, the possibility of getting better job has been substantially reduced. The learned Counsel relied upon various Judgments to which reference will be made at a later stage.

7. In so far as the aspect of negligence is concerned, as stated earlier, the case of the Appellant is that it was the driver of the car which suddenly took a right turn in a very high speed and inspite of application of brakes the driver of the bus could not avoid the accident. In view of this contention, the evidence on

record will have to be considered. The driver of the bus stepped into the witness box. In the first paragraph of his deposition, the driver of the bus has stated as under:

> "I was going towards Mahim Dadar side. My bus was going by Lady Jamshedji Road towards Mahim Dadar. My bus came near the junction of Ali Yawar Jung Road and Lady Jamshedji Road which is also known as Mahim Causeway Road. The road to my/left leads to Airport. There was traffic signal but it was flickering i.e. traffic signal was not working i.e. free signal. The ambassador car No.MRD-6744 came from Mahim side by Lady Jamshedji Road and it wanted to take turn towards Ali Yawar Jung Road for going to Airport. It was drizzling. The wipers of my bus were working. Parallel to my bus was moving one BEST bus it was proceeding towards Dadar side. I allowed it to pass towards Dadar side. Then that BEST bus went ahead of me and was at a distance of about 4 to 5 feet from my bus. In the meantime the ambassador car MRD-6744 was taking the right turn towards Airport side. Then the driver of the BEST bus applied the brakes and then

> the car MRD-6744 came in front of me. I applied emergency brakes. Hence my bus slipped and the bumper of my bus hit the left door of the ambassador car."

Thus the case made out in the deposition of the driver was that when the accident took place it was drizzling and there was a BEST bus running parallel to his bus moving in the same direction towards Dadar. He stated that he allowed the BEST bus to pass towards Dadar side and the BEST bus was ahead of his bus at a distance of about 4 to 5 feet. At that time the ambassador car in which the Respondent No.1 was travelling took right turn and when be applied brakes the bus hit the left side door of the ambassador car. In the cross-examination the driver of the bus stated that at the time of accident there were only three vehicles, viz, his bus, BEST bus and the ambassador car near the signal. He also stated that when he came near the signal, he could see Mahim Causeway upto a distance of 3 to 4 furlong and the Mahim Causeway is a straight road. However, he further stated that the car was seen by him for the first time when it was at a distance of about one feet from the bus. A suggestion given to him that BEST bus was not present was denied by him. In the written statement filed by the Appellant the manner in which the accident took place is described in paragraph No.2.

Surprisingly it is not mentioned in the written statement that there was a BEST bus running parallel to the bus owned by the Appellant. Thus an improvement is attempted to be made by the Appellant while leading oral evidence.

8. The Respondent No.1/Appplicant also gave evidence and he described in para 1 of his deposition the manner in which the accident took place. He pointed out that the bus came from Bandra side and was being driven in a high speed and it dashed with the Ambassador Car in which he was travelling. The Respondent No.1 was cross-examined in detail by the Advocate appearing for the Appellant. A perusal of the cross examination shows that a suggestion was given to the Respondent No.1 that the driver of the bus was giving signal for allowing him to go ahead. However, no specific suggestion was given to the Respondent No.1 about the presence of BEST bus which was allegedly running parallel to the bus of the Appellant. The learned Counsel for the Appellants tried to make capital of the statement made by Respondent No.1 that he was not aware whether the driver of the car was not having proper lookout for the incoming traffic. What is to be decided is due to whose negligence the accident has taken place.

9. In so far as the negligence is concerned, there is word against word. In view of the major improvement sought to be made by the Appellant at the time of recording of evidence of the driver, for the reasons recorded the Tribunal thought it fit to discard the evidence of the driver of the bus. After having gone through the records and particularly the oral evidence on record and the findings recorded by the learned Member of the Tribunal, I find that the Tribunal was not in error when a finding was recorded that the accident occurred due to the negligence on the part of the driver of the bus. The learned Member of the Tribunal has also noted that the driver of the car was trying to enter the main road, i.e. Western Express Highway. It is very clear from the evidence of the driver of the bus that Mahim Causeway could be easily seen from the spot of the accident as the road is very straight. Therefore, the Driver of the bus must have noticed the car coming from Mahim Causeway and therefore ought to have taken care when the car was taking right turn towrds Highway. The Driver invented theory of existence of BEST bus obviously to cover lapse on his part. Considering the facts of the case and the evidence on record, the said finding of the learned Tribunal on the issue of negligence will have to be accepted.

10. This takes me to the issue of quantum of compensation payable. In so far as the injuries sustained by the Respondent No.1 are concerned, there is hardly any dispute. The Respondent No.1 has examined Dr.Madhav Pandit who is a practising Orthopaedic Surgeon and who has issued the certificate of disability in favour of the Respondent No.1. He has described the effect of the injuries sustained by the Respondent No.1 in the accident. The witness has stated in his evidence as under:

> . "There was fracture of acetabulum. Acetabulum forms the socket of the hip joint and the ball is formed by the head of femur. Zygomatic bone is the one of the facial bone. It forms joint with the temporal bone. Greater trenchanter stated in my certificate is the prominent part of the thigh bone at the level of hip joint. I have stated in my certificate that the musclog of thigh and buttock show moderate wasting resulting in stiffness weakness and feeling of insecurity in this limb. The wasting means striking of the muscles buttocks and the thigh. This has resulted in stiffness, weakness and feeling of insecurity in the limb. The normal

movements of flexion is 120 degrees. But in this case I found it to be 90 degrees. I have stated that abduction is 20 degrees. But in normal course is about 45 degrees. In normal course the external location is 45 degrees but in this case it was only 10 degrees. I have stated in my certificate that there is extensive calcification in the capsule of the hip joint and surrounding muscles. Calcification means deposition of calcium in the muscles and the capsules due to the injury to the ligaments capsules and the surrounding muscles. The calcification may lead to stiffness in a joint with restriction of the movements.

. By avascular necrosis I mean necrosis i.e. death of tissues due to impairment of the blood supply. Traumatic arthritis means the arthritis caused due to injury which he had sustained in this accident as the applicant was 30 years old when I examined this traumatic arthritis may occur or will occur within five years. But in a normal person possibility of arthritis developing in this particular case after the age of 60 years.

> With these disabilities mentioned in the certificate the applicant cannot do the job which requires outdoor activities. He cannot "Squat". He cannot bend. The Applicant can drive the car but by driving car he will develop pains in the hip. He cannot participate in the game like football."

A perusal of the cross-examination of the doctor by the Appellant shows that there is hardly any challenge to the nature of injuries sustained by the Respondent No.1. The permanent partial disability suffered by the Respondent No.1 has been assessed by Dr.Pandit at 35%. Dr.Pandit a highly qualified Orthopaedic surgeon, and he is M.S.(Orth.) and F.R.C.S. and he completed 28 years of practice as a Surgeon. He has stated that the movement of flexion in the normal man would be 120 degrees, whereas in the Respondent No.1 it was 90 degrees. The effect of the injuries suffered by the Respondent No.1 can be assessed from the evidence of Respondent No.1. He has stated in paragraph 5 of his deposition that because of the fracture of the hip bone, he has lost confidence. He has difficulty in travelling in train. He cannot run and he cannot stand for a long time. He cannot squat and cannot bend and also cannot drive a car.

11. In so far as expenditure incurred by the Respondent No.1 for medical treatment is concerned, a detailed account has been given by the Respondent No.1 in his evidence and documents in support are produced by the Respondent No.1. The Respondent No.1 has described in detail the expenditure incurred by him in paragraph 2 of his deposition. He was admitted in the KEM Hospital for a period from 27th July 1987 to 29nd July 1987. He was admitted in Bombay Hospital as an indoor patient from 29th July 1987 to 2nd October 1987. So far as his evidence in paragraph 2 of his examination-in-chief is concerned, there is hardly any cross-examination by the Appellant. Therefore, the Tribunal has rightly accepted the claim made by the Respondent No.1 of medical expenses and charges paid to the KEM and Bombay hospital. Thereafter the Respondent No.1 was admitted in Bombay Hospital. Therefore, an amount of Rs.1650/- awarded for conveyance and a sum of Rs.3600/- awarded on account of special diet are reasonable. In so far as the amount awarded under the head of pain and suffering is concerned only a sum of Rs.20,000/- has been awarded which is not at all arbitrary considering the nature of injuries suffered by the Respondent No.1.

12. So far as the loss of earning capacity is concerned, the evidence of the Respondent No.1 will have to be seen. Respondent No.1 is a B.Com. graduate and Chartered Accountant. His age at the time of accident was around 28. At the time of accident he was serving in Bank of National De Paris at Bombay. He was working as Accounts Manager in the said Bank. He has produced the certificate at Exh.25 issued by the Bank showing that he was absent from duty from 27th July 1987 to 21st December 1987. The said certificate discloses that for certain period he was on leave without pay, and the recovery for excess leave taken has been made from the salary due to him as detailed in the said certificate. The Respondent No.1 was admitted as indoor patient in the KEM Hospital and subsequently in Bombay Hospital. Respondent No.1 remained absent from duty on account of injuries sustained by him in the accident. In para 13 of the judgment, the learned Member has computed the loss of earning on the basis of actuals. The learned Member has relied upon Exh.25 and came to the conclusion that the total loss of earning by Respondent No.1 was Rs.25,834.18. The said findings is based on the certificate at Exh.25 issued by the Manager of the employer of Respondent No.1. No fault can be found with the said finding of the learned Member.

13. In so far as the prospective loss is concerned, reference will have to be made to various judgments relied upon by Respondent No.1. A Division Bench of this Court in a judgment reported in 1979 A.C.J. page 92 (Master Arjun Fatchand Govindani v/s. Balshit Gulati and another) considered the question of awarding compensation on account of loss of earning capacity. This Court was dealing with the case of a bright student who suffered permanent partial disability to the extent of 25%. Even in case of a student after noting that the permanent handicap is bound to come in the way of the student in making a successful and profitable career, this Court has awarded adequate compensation on that account.

14. In a judgment of the Division Bench of the Gujarat High Court, reported in 1981 A.C.J. page 385 (Bhupendra Kumar Kohli v/s. Oil & Natural Gas Commission), the Court dealt with case of the injury to a person who continued to be employed with the original employer after he suffered handicap. The Gujarat High Court held that test is whether the injured worker can obtain similar employment in a similar pay scale in the open market. Reference is also made to another Judgment of the Division Bench of the Gujarat High Court reported in 1994 A.C.J. page 260 (Mohanbhai Gemabhai v/s. Balubhai

Savjibhai & ors.) In paragraph No.7 of the Judgment in case of Bhupendra (supra) the Court observed:

> "It is no doubt true that he still continues to be employed by the O.N.G.C.and he has been allowed to function as a Welder till now. That, however, is a circumtance which is not germane to question of assessment of damages in connection with the loss of earning capacity. The test to pose in such cases is whether the injured worker can obtain a similar employment in a similar pay-scale in the open market."

15. In the present case it is true that the employer of Respondent No.1 did not terminate the employment of Respondent No.1. The Respondent No.1 is highly qualified. He is holding the degree of B.Com. He is also a Chartered Accountant. He was comparatively of young age of 28 when the accident took place. He was holding the post of Accounts Manager in a foreign bank. As a result of the accident Respondent No.1's pay scale may not have been reduced. However, it cannot be denied that due to the permanent disability suffered by the Respondent No.1 his confidence was affected and his ability to undertake travelling was also adversely

affected. Considering his educational qualifications and position held by Respondent No.1 at an early age, it may not be unreasonable to proceed on the footing that the Respondent No.1 had bright career in banking. It is, therefore, obvious that though the Respondent No.1 did suffer pecuniary loss because of the injuries sustained by him, the future prospects of securing better employment were certainly affected. Though it cannot be said that the injuries completely deprived the Respondent No.1 of securing a better job, the injuries and the disability will certainly have an effect on the prospect of securing a profitable employment.

16. Therefore, it cannot be denied that the Respondent No.1 was entitled to compensation under the head prospective loss of earnings. While deciding the quantum of compensation payable under the said head, it is quite natural that there is bound to be some guess work. Attempt was made before the Tribunal to calculate the loss by taking 35% of the monthly income and capitalising the loss for 20 years. The amount by that calculation comes to Rs.3,78,000/-. The Tribunal did not accept the said figure. By making a broad calculation the learned Member of the Tribunal awarded a sum of Rs.80,000/- under the said head. In paragraph 14 of the Judgment of the Tribunal, a finding is recorded

in that behalf. It is true that the detailed reasons are not assigned for fixing the amount at Rs.80,000/-. Even if the minimum amount per month at Rs.500/- to Rs.1000/- is taken as the approximate pecuniary loss, even for a span of 15 years the claim of Rs.80,000/- awarded by the Tribunal quite reasonable and there is hardly any ground to interfere with the same.

17. The Tribunal has awarded interest at the rate of 12% per annum. It is to be noted here that the claim was decided in January 1990. In some of the recent Judgments of the Apex Court the rate of interest awarded is 9%. However, the Apex Court in the said case has considered the recent trend of fall in the rates of interest during the last few years. Considering the fact that the claim is decided in the year 1990, the rate of interest fixed at 12% cannot be faulted.

18. In the circumstances there is no merit in the First Appeal and the same is dismissed with no order as to costs.

Judge.